09-5[illegible] · 2009

No. [illegible]

In The
Supreme Court of the United States

TERRY ASHABRANNER,

Petitioner,

v.

JEANETTE GOODMAN, INDIVIDUALLY AND AS ADMINISTRATRIX OF THE ESTATE OF MICHAEL W. GOODMAN, DECEASED,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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November 3, 2009

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QUESTIONS PRESENTED

1. In a Fourth Amendment-qualified immunity case in which the defendant does not assert his own mental condition in defense of the plaintiff's claim, is the defendant's mental condition "in controversy" and relevant to the reasonableness inquiry?

2. In a civil case is it a clear abuse of the district court's discretion to permit a psychiatrist to comment on a defendant's character and credibility through the guise of expert medical opinion?

LIST OF PARTIES

Defendant-Petitioner:
Terry Ashabranner

Plaintiff-Respondent:
Jeanette Goodman

Defendants (not parties in this Court):
Harris County, Texas
Ed Emmett
El Franco Lee
Steve Radack
Jerry Eversole
Sylvia Garcia
Ron Hickman

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Terry Ashabranner respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINION BELOW

The opinion of the Court of Appeals is reported at 571 F.3d 388. The opinion is reproduced in Appendix A to this petition.

STATEMENT OF JURISDICTION

The district court exercised federal question jurisdiction pursuant to 42 U.S.C. § 1331. The Court of Appeals reviewed the district court's judgment pursuant to 28 U.S.C. § 1291. The Court of Appeals filed its opinion and judgment on June 9, 2009. Petitioner's timely filed petition for rehearing en banc was denied on August 7, 2009. Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions involved in this case, 42 U.S.C. § 1983, FED. R. CIV. P. 35(a) and FED. R. EVID. 404(a), are reproduced in Appendix E, Appendix F and Appendix G, respectively.

STATEMENT OF THE CASE

Jeanette Goodman brought this suit in state court pursuant to the provisions of 42 U.S.C. § 1983. She alleged that former Deputy Constable Terry

Ashabranner employed excessive force against her decedent, Michael Wayne Goodman. Ashabranner stopped Goodman when he observed Goodman riding his unlighted bicycle at night on a public road. Riding the bicycle without a light was a violation of the Texas Transportation Code. Ashabranner asked Goodman for his identification. Ashabranner observed something shiny towards Goodman's back. The testimony of a nonparty witness confirmed that Goodman had a metal object in his back pocket. Goodman did not present his identification and did not give his name. As Ashabranner attempted to place his hand on the shiny object, Goodman struck and pushed Ashabranner with his left hand. Ashabranner stumbled backwards, ending up on his backside. Ashabranner was on duty and was in uniform at the time. Consequently, Goodman's striking or shoving Ashabranner was a third degree felony under Tex. Penal Code Ann. § 22.01.

Goodman took off running with his bicycle, pushing it. Ashabranner shouted "Stop. Police." Ashabranner was patrolling with his police dog, Nero. Although Ashabranner gave a canine warning at least twice, Goodman did not stop. Ashabranner released Nero and gave him a command to apprehend Goodman. Ashabranner saw Nero apprehend Goodman and hang on to his left shoulder. Ashabranner followed Goodman and Nero and found them in water by the side of the road. Ashabranner could not see Goodman's hands, because they were in the water, holding Nero's head under. When Ashabranner asked Goodman to release Nero, Goodman said he was going to kill the dog.

Ashabranner tried to lift Goodman up out of the water. Goodman released the dog and struggled with Ashabranner. Goodman turned and with his left arm gave Ashabranner a shove or a strike. Ashabranner fell back, ending up on his buttocks. Ashabranner saw Goodman's right hand go back and make a movement towards his back pocket or mid-back area. Ashabranner was in fear that Goodman was going to retrieve something from his back side and cause him great harm. Ashabranner pulled his weapon and fired. Goodman was two or three feet away when Ashabranner shot him.

Goodman died. Ashabranner is the only surviving witness to the incident. The Plaintiff questioned the veracity of Ashabranner's account of what happened, because Goodman had been shot in the right arm approximately three months before this event took place. The Plaintiff contended that Goodman was seriously physically disabled as a result of that wound.

Defendants Harris County, Texas, former Harris County Judge Robert Eckels[1], County Commissioners El Franco Lee, Steve Radack, Jerry Eversole, and Sylvia Garcia, Constable Ron Hickman and Petitioner Ashabranner removed the suit to federal court. Summary judgment was granted in favor of all Defendants on all claims except the "deadly force claim" against Petitioner Ashabranner. Petitioner asserted his entitlement to qualified immunity. Trial

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[1] Pursuant to Rule 43(c)(2) of the Federal Rules of Appellate Procedure, Harris County Judge Ed Emmett, in his official capacity, was automatically substituted as a party to this appeal in place of Judge Eckels, in his official capacity. Judge Eckels was not sued in his individual capacity. R-1900.

was to a jury which made findings favorable to the Plaintiff and awarded compensatory damages in the amount of $2,000,000.00 and punitive damages in the amount of $3,000,000.00. The district court granted judgment in favor of the Plaintiff based on the jury's verdict. Ashabranner perfected his appeal from the district court's rulings.

On June 9, 2009, a panel of the United States Court of Appeals for the Fifth Circuit affirmed the judgment of the district court in all respects. Petitioner Ashabranner timely filed a Petition for Rehearing En Banc seeking review by the full court. The petition was denied on August 7, 2009.

REASONS FOR GRANTING THE WRIT

Prior to the trial of this case the district court ordered Petitioner Ashabranner to submit himself to the Plaintiff for a mental examination. R-770. The examination was performed by Dr. Jay Tarnow, a psychiatrist, with the assistance of Dr. Sophie Havasy, a psychologist. R-4756-4757. Subsequently, Petitioner sought the exclusion of any testimony concerning his mental condition by motion in limine. R-2053-2055. Specifically, Petitioner requested that the court exclude the opinions of Dr. Tarnow in their entirety. He argued that the Plaintiff's excessive force claim is analyzed under the Fourth Amendment's reasonableness standard, citing Graham v. Connor, 490 U.S. 386, 395 (1989). He further argued that the court would look only to objective factors in determining the qualified immunity defense and, therefore, his mental condition at the time of his use of deadly force was wholly irrelevant. The district court denied that portion of the Petitioner's motion. R-2639-

2640. Before Dr. Tarnow gave any testimony concerning his findings, counsel for Ashabranner objected "to any testimony about a mental examination", because such testimony is "not relevant" and "it violates the rules in Graham v. Connor". R-4756. Ashabranner's counsel then requested a "running objection" to all testimony or evidence having anything to do with Ashabranner's mental condition. R-4757. A running objection was granted and the objection was overruled.[2] R-4757. Thereafter, Dr. Tarnow gave clearly inadmissible and highly prejudicial opinion testimony concerning Ashabranner's mental condition, his character and his credibility.

I. The Court of Appeals' Opinion Misapplies This Court's Construction of Rule 35 of the Federal Rules of Civil Procedure in Schlagenhauf v. Holder, Employs a "Relevance" Analysis That Is Not In Accord With the Holdings of This Court in Graham v. Connor, and Conflicts With the Eighth Circuit's Analysis in a Case Involving the Use of Similar Psychiatric Testimony.

II. This Case Presents the Court An Opportunity To Construe and Clarify The Effect of Amended Federal Rule of Evidence 404(a) in Civil Cases.

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[2] A running objection adequately preserves an objection to a witness' testimony. Tyler v. Union Oil Co. of California, 304 F.3d 379, 392 n. 6 (5th Cir. 2002).

On appeal the Court of Appeals concluded that it was not an abuse of the district court's discretion to grant the Respondent's motion for a psychiatric evaluation of the Petitioner. Appendix A, p. 18a. In so concluding the court misapplied this Court's construction of Rule 35 of the Federal Rules of Civil Procedure in Schlagenhauf v. Holder, 379 U.S. 104 (1964). The Petitioner's mental condition was not "in controversy" in this case. The Court of Appeals further concluded that the psychiatric testimony admitted in this case was relevant and, therefore, the district court did not abuse its discretion in allowing the testimony. Appendix A, p. 18a-20a. In reaching this conclusion the Court of Appeals employed a "relevance" analysis that is not in accord with the holdings of this Court in Graham v. Connor. Further, the Court's holding conflicts with the analysis of the United States Court of Appeals for the Eighth Circuit in a case involving the use of similar psychiatric testimony. See Nichols v. American Nat. Ins. Co., 154 F.3d 875, 884 (8th Cir. 1998)("It is plain error to admit testimony that is a thinly veiled comment on a witness' credibility...".). Permitting testimony of this sort manifestly threatens the right to a fair trial. In the instant case it completely denied the Petitioner that right.

Dr. Tarnow said that Ashabranner showed weakness in numerical reasoning, some short-term memory weakness and attention span issues. He said that these things can relate to A.D.H.D. He said he was concerned about "impulsivity". R-4761. Dr. Tarnow stated that Ashabranner was reluctant to present himself as he truly was and was resistant to admitting any personal shortcomings. R-4763. He said that Ashabranner had a strong focus on being virtuous and is "over controlled". R-4764. He further

stated that Ashabranner was reluctant to give full disclosure and became angry if the doctor would point out inconsistencies in what Ashabranner told him about events. R-4768.

When asked to give specific instances of inconsistent statements by Ashabranner, Dr. Tarnow testified as follows:

> "Well, I think that the –probably the most inconsistent were helping me understand about what happened that evening and what he was thinking about that evening, you know, why – because I wanted to know is: Okay. Here is a man who is riding his bike on the wrong side of the road, doesn't have a light. You go over and you stop him and you ask him some questions. But it seemed that this escalated. So, why did it escalate?
>
> And I think the – what I got – the understanding I had was that Mr. Goodman was not responding to him and wouldn't respond to him, didn't talk to him, which made him angry and felt that Mr. Goodman was being defiant of him. So, I think that – that incident, in terms of what was going on, what he was thinking, came to this point that he was feeling that Mr. Goodman had defied him. And I think that that was very upsetting to him, and that's what I finally understood about why he was pushing – you know, kept on going back and getting him to stop and pulling him over and such. And it seemed that he was getting more and more angry."

R-4769-4770. Dr. Tarnow further stated that Ashabranner told Dr. Havasy that he was sad about what happened. However, Dr. Tarnow said that he could not find any remorse or guilt or negative feelings in Ashabranner. R-4770. He described Ashabranner's answers to his questions as "very glib". R-4771. He even told the jury that Ashabranner was "rehearsed" and "had prepared for the interview". R-4775.

Dr. Tarnow said that Ashabranner's thinking was distorted by his emotions. In that regard, he stated that Ashabranner made it clear Nero was part of the family, "like a child". He said that Ashabranner got very upset about Goodman hurting "his baby". R-4772-4773. Dr. Tarnow was asked his opinions about Ashabranner based on "reasonable medical probability and reasonable psychological probability". He responded as follows:

> "My concern was that I thought that he reacted – overreacted and reacted impulsively. I was concerned about some of his impulsivity in his life and that that's a problem that I was concerned about. I was concerned that he had such a need to see things in black and white, that he does see things in black and white, that good guys and bad guys – as a matter of fact, he called Mr. Goodman a bad guy – and that he saw things as good versus bad and that his issues with authority were such that he overreacted to Mr. Goodman's behavior which then precipitated a confrontation."

R-4778.

Petitioner submits that the admission of Dr. Tarnow's testimony constituted plain error which denied his right to a fair trial. It was error to have ordered the examination in the first place, because the requirements of Rule 35(a) of the Federal Rules of Civil Procedure concerning "good cause" and "in controversy" were not met. Schlagenhauf, 379 U.S. at 119-120 ("Rule 35 required that these parties make an affirmative showing that petitioner's mental or physical condition was in controversy and that there was good cause for the examinations requested."). The Court of Appeals appeared to recognize the infirmity of the order when Ashabranner attempted an interlocutory appeal which the court dismissed for want of jurisdiction. See Goodman v. Harris County, 443 F.3d 464, 469, n. 6 (5th Cir. 2006)("Nothing puts this order beyond the scope of this court's review. We clearly have the ability to reverse an adverse judgment based on inadmissible evidence." *** "Our jurisdictional determination is not an endorsement of the merits of the Rule 35 order."). However, on appeal from the final judgment, the Court of Appeals held that ordering the examination was not an abuse of discretion, because the district court allowed the evaluation "to level the playing field". Appendix A, p. 18a. In its order the district court had said that "the parties have indicated that it is the intent of the Defendants to try this case by presenting an expert to opine about the manner which Mr. Goodman would have likely reacted back in 2002 based on his past history. ... [I]t appears to the Court that if the Defendants propose to try this case by establishing what likely happened based on psychiatric testimony that both sides should be able to avail themselves of

that opportunity." R-770. [3] Even if that could amount to good cause, it would not show that Ashabranner's mental condition was "really and genuinely in controversy". Schlagenhauf, 379 U.S. at 118. Like Schlagenhauf, Ashabranner did not assert his own mental condition in defense of the Plaintiff's claim. Further, in a Fourth Amendment case the reasonableness inquiry is an objective one. Graham, 490 U.S. at 397 ("As in other Fourth Amendment contexts, however, the 'reasonableness' inquiry in an excessive force case is an objective one: the question is whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation."). Therefore, Ashabranner's subjective state of mind was not in issue.

The error of ordering the examination was compounded by admitting the results of the examination during the trial. Concern about the damage the admission of this sort of testimony could cause was the reason for Justice Douglas' prescient warning in his dissent in Schlagenhauf, in which he said the following:

> "Once defendants are turned over to medical or psychiatric clinics for an analysis of their physical well-being and the condition of their psyche, the effective trial will be held there and not before the jury. There are no lawyers in those clinics to stop the doctor from probing this organ or that one, to halt a further inquiry, to

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[3] Subsequently, the district court granted the Plaintiff's motion to exclude the testimony of the Defendant's expert. R-1296.

> object to a line of questioning. And there is no judge to sit as arbiter. The doctor or the psychiatrist has a holiday in the privacy of his office. The defendant is at the doctor's (or psychiatrist's) mercy; and his report may either overawe or confuse the jury and prevent a fair trial."

Schlagenhauf, 379 U.S. at 125.

Dr. Tarnow's testimony was highly prejudicial and inflammatory. Further, it had no relevance to any issue in the case. As the Court of Appeals noted in Stroik v. Ponseti, 35 F.3d 155, 159 n. 6 (5th Cir. 1994), testimony that an officer seemed "enraged" and that his pre-employment psychological profile indicated that he had "poor impulse control" focuses on the officer's subjective state of mind. Such focus disregards this Court's instruction in Graham that the courts determine objectively the reasonableness of a police officer's use of force, "without regard to [his] underlying intent or motivation". In addition, Dr. Tarnow's testimony pertained to Ashabranner's character[4] and credibility as a witness. As made clear by the Advisory Committee Notes which accompany the 2006 Amendments of Rule 404 of the Federal Rules of Evidence, "in a civil case evidence of a person's character is never admissible to prove that the person acted in conformity with the character trait".[5]

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[4] "Character evidence" is "[e]vidence regarding someone's personality traits". Black's Law Dictionary 576 (7th ed. 1999).

[5] The Court has often relied on the Advisory Committee Notes to interpret the rules. Corley v. United States, 556 U.S. ___, ___, 129 S.Ct. 1558, 1570-1571 (2009); United States v. Vonn, 535 U.S.

Further, no expert witness is authorized to testify concerning the credibility of a witness.

The danger associated with admitting character evidence is aptly described in the initial Advisory Committee Notes on proposed Rule 404, in which the Committee quoted a California Law Revision Commission Report as follows:

> "Character evidence is of slight probative value and may be very prejudicial. It tends to distract the trier of fact from the main question of what actually happened on the particular occasion. It subtly permits the trier of fact to reward the good man and to punish the bad man because of their respective characters despite what the evidence in the case shows actually happened."

Advisory Committee Notes on the 1972 Proposed Rules. The Advisory Committee further recognized that "expanding concepts of 'character,' ... seem of necessity to extend into such areas as psychiatric evaluation and psychological testing". *Id.* This case, which involves precisely that form of character evidence, presents the Court an opportunity to construe and clarify the effect of amended Rule 404(a) in civil cases.[6]

55, 64 n.6 (2002)("In the absence of a clear legislative mandate, the Advisory Committee Notes provide a reliable source of insight into the meaning of a rule, especially when, as here, the rule was enacted precisely as the Advisory Committee proposed.").

[6] Compare Schlagenhauf, 379 U.S. at 109 ("We granted certiorari to review undecided questions concerning the validity and construction of Rule 35.").

Weighing evidence and determining the credibility of witnesses are tasks that are exclusively for the jury and an expert "should not offer an opinion about the truthfulness of witness testimony". Nichols, 154 F.3d at 883. That is, in effect, what Dr. Tarnow did in this case. Compare the description of the psychiatrist's testimony in Nichols with the testimony in the instant case:

> "Dr. Pribor's testimony about psychiatric credibility, malingering, recall bias, and secondary gain went beyond the permissible areas of her testimony. She used these terms to indicate that Nichols' version of the facts was inconsistent and changed over time and that it was tainted by bias and desire for financial gain. These were inferences for the jury to draw from the admissible evidence before it, and Dr. Pribor's testimony impermissibly instructed the jury on how to weigh that evidence."

Nichols, 154 F.3d at 883-884. The Eighth Circuit called it "plain error" to admit testimony that is "a thinly veiled comment on a witness' credibility". Nichols, 154 F.3d at 884. The court noted that the prejudice resulting from the testimony was increased because of the use that was made of it in closing argument. *Id.* Similarly, in the instant case the jury was reminded of Dr. Tarnow's testimony by Plaintiff's counsel in closing argument as follows:

> "Now, when you heard Dr. Tarnow, what did he say? Dr. Tarnow gave you a profile of a man based on objective psychological testing, three hours worth that a Dr. Sophie Havasy did, a psychologist, that he was resistant to admitting

> any shortcomings. He needs to appear composed virtuous, calm, and in control. He allies himself with social institutions that we all favor, such as law enforcement and the church.
>
> ***
>
> And Dr. Tarnow continued; and based on Dr. Havasy, he appeared well coached for those sessions. In other words, he found some of the answers were real glib and fast; and others he wouldn't answer at all. In fact, he got mad once; and either Dr. Tarnow walked out or he walked out. They stopped the session during his two one-and-a-half-hour sessions that were about 10 days apart. He says that he sees everything in black and white. He sees – beneath his calm façade, Ashabranner has a rage. He's upset. He got upset at Dr. Tarnow, and he got upset at me for allegedly call –
>
> ***
>
> He said that he impulsively decides to do things and that when he saw the dog being killed – being allegedly killed or held under water, it clouded his judgment and his vulnerabilities and caused him to be enraged and act impulsively. Now, does that fit Ashabranner in this case? It fits him to a T."

R-5206-5207.

Dr. Tarnow was permitted to comment on Ashabranner's credibility "in the guise of a medical opinion" and the Plaintiff relied heavily on this inadmissible evidence in closing to undermine

Ashabranner's description of Goodman's actions. Compare Nichols, 154 F.3d at 883, 890. In the instant case Ashabranner's credibility was the central issue before the jury. His description of the events in question would show that either no constitutional violation occurred or he was entitled to qualified immunity. Compare Ramirez v. Knoulton, 542 F.3d 124, 130 (5th Cir. 2008); Carr v. Tatangelo, 338 F.3d 1259, 1270 (11th Cir. 2003); Mace v. City of Palestine, 333 F.3d 621, 624 (5th Cir. 2003); Anderson v. Russell, 247 F.3d 125,132 (4th Cir. 2001); Reese v. Anderson, 926 F.2d 494, 501 (5th Cir. 1991); and Young v. City of Killeen, 775 F.2d 1349, 1350-1353 (5th Cir. 1985). Consequently, it was incumbent upon the Plaintiff to attack Ashabranner's credibility as a witness. However, the Plaintiff chose to do so through the guise of expert medical opinion. The questioning of Dr. Tarnow placed him "in the posture of a compurgator (or anti-compurgator)". United States v. Wertis, 505 F.2d 683, 685 (5th Cir. 1974). When asked if he found it usual or unusual that Ashabranner said he had been pushed down on two different occasions by Goodman, Dr. Tarnow said the following:

> "Well, in looking through the medical documents related to Mr. Goodman, I was really surprised about *those statements* because of Mr. Goodman's right arm being pretty much useless. And so, the difference in size and such *didn't make any sense to me* that Mr. Goodman would have that much strength and capability to be able to push Mr. Ashabranner anywhere." (emphasis added)

R-4774. Such testimony was not a proper subject of expert testimony under Rule 702 of the Federal Rules

of Evidence. Nichols, 154 F.3d at 883. Further, opinion testimony of the sort given by Dr. Tarnow is prejudicial, confusing and misleading to the jury within the meaning of Rule 403 of the Federal Rules of Evidence. Nimely v. City of New York, 414 F.3d 381, 398 (2d Cir. 2005)(issues of credibility lay at the heart of this trial and expert's vouching for veracity of witnesses was prejudicial, confusing and misleading to the jury). Compare Salas v. Carpenter, 980 F.2d 299, 305 (5th Cir. 1992)(expert's conclusory assertions regarding defendant's state of mind would not be helpful to a jury and were not admissible). See also United States v. Charley, 189 F.3d 1251, 1267 (10th Cir. 1999)("In general, expert testimony which does nothing but vouch for the credibility of another witness encroaches upon the jury's vital and exclusive function to make credibility determinations, and therefore does not 'assist the trier of fact' as required by Rule 702.") and Westcott v. Crinklaw, 68 F.3d 1073, 1076 (8th Cir. 1995)("Nor may an expert pass judgment on a witness' truthfulness in the guise of a professional opinion."). The admission of this testimony clearly affected Ashabranner's substantial rights as well as the fairness of this judicial proceeding.

The Court of Appeals stated that "Dr. Tarnow nowhere concluded or testified that ... Ashabranner fabricated any or all of his testimony". Appendix A, p. 18(a). Further, the court said that "Dr. Tarnow never opined that Ashabranner was lying but only presented the jury with the fact that he observed inconsistencies". Appendix A, p 19a. Petitioner submits that the effect of Dr. Tarnow's expert testimony was to tell the jury that the Petitioner's description of what happened on the occasion in question should not be believed. Compare United

States v. Binder, 769 F.2d 595, 602 (9th Cir. 1985), *overruled on other grounds by* United States v. Morales, 108 F.3d 1031, 1035 n.1 (9th Cir. 1997)(en banc)("Binder claims that while none of the experts was allowed to testify specifically as to the complaining witnesses' credibility, *the effect of the expert testimony* was to "improperly buttress" that credibility. We agree.")(emphasis added). Dr. Tarnow did not need to use the word "lying" to convey that message.

The Court of Appeals found Dr. Tarnow's testimony highly relevant to the question of whether Ashabranner suffered from any limitations that may have affected his ability to accurately recall the night Michael Goodman died. In that regard the court referred to testimony that Ashabranner showed cognitive weaknesses, some short-term memory problems and attention span limitations. Appendix A, p. 18a. However, Dr. Tarnow never said that any of such matters would have affected Ashabranner's ability to accurately recall the events in question at trial. He said that their significance was that sometimes those things are related to people who have Attention Deficit Hyperactivity Disorder. R-4094. The Court of Appeals further found Dr. Tarnow's testimony relevant on the ground that it helped the jury understand Ashabranner's view of Michael Goodman that night and aided in the determination of whether Ashabranner's decision to shoot was objectively reasonable. Appendix A, p. 19a. Petitioner submits that his "view" of Michael Goodman pertains only to his subjective state of mind, which has no relevance in an objective reasonableness inquiry. As this Court said in Graham, 490 U.S. at 397-398,

> "Whatever the empirical correlations between 'malicious and sadistic' behavior and objective unreasonableness may be, the fact remains that the 'malicious and sadistic' factor puts in issue the subjective motivations of the individual officers, which our prior cases make clear has no bearing on whether a particular seizure is 'unreasonable' under the Fourth Amendment. Nor do we agree with the Court of Appeals' conclusion, that because the subjective motivations of the individual officers are of central importance in deciding whether force used against a convicted prisoner violates the Eighth Amendment, it cannot be reversible error to inquire into them in deciding whether force used against a suspect or arrestee violates the Fourth Amendment. Differing standards under the Fourth and Eighth Amendments are hardly surprising: the terms 'cruel' and 'punishments' clearly suggest some inquiry into subjective state of mind, whereas the term 'unreasonable' does not."

(footnote and citations omitted). Further, Dr. Tarnow did not "merely recount[] what Ashabranner had described" and did not describe Ashabranner's anger "based on Ashabranner's own statements" as the Court of Appeals' opinion suggests. Appendix A, p. 19a. The record reflects that Dr. Tarnow gave his "understanding" of what happened on the night in question. R-4769-4770. In other words, he drew an inference as to what happened, which was solely the function of the jury, not an expert witness. Nichols, 154 F.3d at 883 ("The relevancy of the testimony depends upon whether it can properly be applied to assist the trier of fact to decide facts in issue. Such

evidence is not helpful if it draws inferences or reaches conclusions within the jury's competence or within an exclusive function of the jury.")(citations omitted).

The Court of Appeals also concluded that the admission of Dr. Tarnow's testimony, if error, was harmless. Appendix A, p. 19a. The court stated that the jury was presented with forensic, physical and medical evidence that contradicted Ashabranner's account. The key evidence in that regard was testimony that Michael Goodman's right arm was "virtually useless" due to a gunshot wound. Appendix A, p. 15a. The testimony came from two lay persons (the Plaintiff and one of Goodman's friends) and Dr. Tarnow (who never saw Goodman and who simply looked at the autopsy report). R-4730-4732, 4830-4832, 4774, 4787. The Plaintiff-Respondent testified that her son was shot in the arm in January, 2002 and had problems with his arm in January and February. R-4830-4832. However, she gave no testimony concerning the condition of Goodman's arm in April, 2002, the month in which the subject incident occurred. The friend, Dustin Kelly, said that Goodman did not have a lot of use of his right arm, because it was "messed up" from being shot. R-4730. He asserted that he did not believe Goodman could have lifted anything heavy after he was shot and did not believe Goodman was physically capable of pushing another person over. R-4731. He also did not think that Goodman could have "wrestled with" a sixty-five pound dog. R-4732. Dr. Tarnow described Goodman's arm as "pretty much useless". R-4774. However, he admitted that he does not "know about gun shot wounds in that area". R-4787. All of this testimony was speculative at best. Speculation simply does not meet the standard of "substantial evidence". Further,

Petitioner submits that the record contains physical evidence which utterly discredits that testimony.

It was undisputed by the Plaintiff that on the night in question Michael Goodman carried a duffle bag (Defendant's Exhibit 20) and its contents, a radiodetection device (Defendant's Exhibit 25), *on his right shoulder*. R-5046-5048, 5057, 5204. Plaintiff's counsel described this in closing argument as "50 pounds of detection equipment" in a pack which was "over his right shoulder". R-5204. Ashabranner testified that Goodman had picked up the duffle bag with his right arm and put it on his right shoulder when he attempted to flee on his bicycle. R-4544. One needed only to place the two parts of the radiodetection device in the duffle bag, lift it up and place it on his or her shoulder to determine that no reasonable juror who examined that evidence could conclude that Goodman's right arm was "useless" or that he was physically incapable of reaching his right hand behind his back as Ashabranner described[7], particularly in view of the testimony of Dr. Dwayne Wolf. Dr. Wolf, the medical examiner who performed the Goodman autopsy, testified that he did not believe Goodman's range of motion would have been impaired by the bone fracture resulting from the gunshot and he would not have expected that fracture to have seriously impaired the use of Goodman's right arm "at this point". R-5124. Thus, there was no substantial evidence from which a juror could infer that Ashabranner was lying about Goodman moving his

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[7] Goodman's act of reaching toward his back pocket was the type of action which signals danger to a trained police officer. R-4955-4957.

right hand towards his back pocket. Compare Thompson v. Hubbard, 257 F.3d 896, 900 (8th Cir. 2001)("The evidence adduced by the plaintiffs is simply insufficient to support even an inference that Hubbard is lying, nor is it sufficient to satisfy the plaintiffs' burden of proving that his actions were not objectively reasonable."). Although a "well-supported suspicion of mendacity" may serve as a legitimate basis for the factfinder's reasonable inferences concerning the ultimate facts at issue when the circumstances are conducive to lying, the suspicion must be "well-supported". Hathaway v. Bazany, 507 F.3d 312, 322 (5th Cir. 2007), citing Thomas v. Great Atlantic and Pacific Tea Co., Inc., 233 F.3d 326, 331 (5th Cir. 2000). In the instant case any suspicion concerning Ashabranner's account of this event is not "well-supported" by the evidence. In fact, it is supported only by speculation and conjecture.

As this Court said in Scott v. Harris, 550 U.S. 372, 380 (2007), "when opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment". Petitioner submits that, likewise, the Court of Appeals should not have given weight to "utterly discredited" evidence in the record when conducting harmless error analysis. Absent the discredited evidence in this case Ashabranner's account was basically uncontradicted, except for Dr. Tarnow's testimony. Consequently, that testimony loomed large before the jury. As a result of its admission, Petitioner Ashabranner suffered substantial prejudice.

The foregoing issues merit review by this Court, because of the implications of allowing irrelevant psychiatric testimony as a method of attack on a defendant's credibility. Inflammatory opinion testimony of this type creates "a serious danger of confusing or misleading the jury, ... causing it to substitute the expert's credibility assessment for its own common sense determination", thus denying the right to a fair trial. Nichols, 154 F.3d at 883. Further, the Court should grant review to clarify that in a civil case evidence of a person's character is never admissible to prove that the person acted in conformity with the character trait. FED. R. EVID. 404(a).

CONCLUSION

For the foregoing reasons the petition for a writ of certiorari should be granted.

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APPENDIX

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 07-20816

[Filed June 9, 2009]

JEANETTE GOODMAN, Individually and as administratrix of the estate of Michael W Goodman Deceased

Plaintiff-Appellant-Cross-Appellee

v.

HARRIS COUNTY; ROBERT ECKELS, Harris County Judge; EL FRANCO LEE, Harris County Commissioner; STEVE RADACK, Harris County Commissioner; SYLVIA GARCIA, Harris County Commissioner; RON HICKMAN, Harris County Precinct 4 Constable

Defendants-Appellees

TERRY ASHABRANNER, Deputy Constable

Defendant-Appellee-Cross-Appellant

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 4:03-CV-4198

Before WIENER, DENNIS, and CLEMENT,
Circuit Judges.

EDITH BROWN CLEMENT, Circuit Judge.

This civil suit arises from the fatal shooting of Michael Goodman ("Michael") by Harris County, Texas, Deputy Constable Terry Ashabranner ("Ashabranner"). Jeanette Goodman ("Goodman"), Michael's mother, appeals from the district court's grant of summary judgment in favor of Harris County and Constable Ron Hickman ("Hickman") on her Texas Tort Claims Act ("TTCA") causes of action, and her 42 U.S.C. § 1983 claims. Ashabranner appeals from the jury verdict which awarded $5 million to Michael's estate. For the reasons set forth below, we affirm.

FACTS AND PROCEEDINGS

During his patrol of a rural area of Harris County, Texas, Ashabranner attempted to stop Michael who was riding his bicycle on the roadway. The parties dispute what happened next. Ashabranner claims that Michael ignored him as he attempted to approach and warn him of the unsafe condition of riding on the wrong side of the road without a light. Then, Michael allegedly assaulted Ashabranner, and fled on his bicycle. What is not in dispute is that Ashabranner released his canine, Nero, who pursued Michael. Ashabranner asserts that he saw Michael reach for a

shiny object[1] in his pant's pocket when he attempted to rescue Nero whom Michael was allegedly trying to drown in standing roadside water. Ashabranner ultimately shot Michael at close range, killing him.

Goodman, individually and as Administratrix of her son's estate, brought suit against eleven defendants alleging various federal and state law causes of action. Among these defendants, Goodman sued Harris County, Ashabranner's employer, and Hickman, Ashabranner's supervisor, seeking to hold them liable under the TTCA. The estate also raised several § 1983 claims against Harris County asserting deliberate indifference to formulating policies and training programs for its deputy constables in the use of deadly force, against Hickman for negligent supervision and training of Ashabranner, and against Ashabranner for excessive use of force. The defendants moved for summary judgment. The district court granted summary judgment on all but the § 1983 excessive use of force claim against Ashabranner. All other claims were dismissed. After an interlocutory appeal,[2] the case proceeded to trial on the sole individual-capacity claim against Ashabranner. The jury returned a verdict for Goodman, awarding $2 million in

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[1] A pair of pliers was later recovered from the scene.

[2] Ashabranner appealed the district court's denial of summary judgment on the basis of qualified immunity on the excessive use of force claim. This court determined that it lacked jurisdiction to hear the appeal. *Goodman v. Harris County*, 239 F. App'x. 869, 872 (5th Cir. 2007) (unpublished). The same appeal also contained Goodman's claims that the district court erred in granting summary judgment in favor of the defendants. Her appeal was likewise dismissed on jurisdictional grounds. *Id.* at 874–75.

compensatory damages and $3 million in punitive damages.

Ashabranner appeals from the jury verdict and Goodman appeals from the grant of summary judgment. Goodman argues that: 1) Harris County and Hickman are liable under the TTCA, 2) Hickman was not entitled to qualified immunity for failing to train and supervise Ashabranner, and 3) Harris County is liable for its deliberate indifference to the need for training. Ashabranner appeals from the jury verdict, arguing that: 1) the evidence was insufficient to support the jury verdict and overcome his qualified immunity, 2) the punitive damages verdict should be reversed, 3) the district court clearly abused its discretion in admitting expert testimony regarding his mental condition, and 4) the district court clearly abused its discretion in refusing to submit Ashabranner's proposed interrogatory to the jury.

STANDARD OF REVIEW

We review a district court's grant of summary judgment *de novo*. *See Richardson v. Monitronics Int'l, Inc.*, 434 F.3d 327, 332 (5th Cir. 2005). Summary judgment is appropriate "if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." FED. R. CIV. P. 56(c). "We consider the evidence in a light most favorable to [Goodman], the non-movant, but she must point to evidence showing that there is a genuine fact issue for trial" to survive summary judgment. *Richardson*, 434 F.3d at 332.

"In reviewing the sufficiency of the evidence to support a jury verdict in a civil action, we must affirm unless there is *no* legally sufficient evidentiary basis for the jury's verdict." *Lane v. R.A. Sims, Jr., Inc.*, 241 F.3d 439, 445 (5th Cir. 2001) (internal quotation omitted). In this analysis, "the evidence, as well as all reasonable inferences from it, are viewed in the light most favorable to the verdict." *Id.* We reverse a district court's denial of a motion for a new trial only when "there is a clear showing of an abuse of discretion. To show an abuse of discretion in this respect, the defendant must show an absolute absence of evidence to support the jury's verdict." *Foradoi v. Harris*, 523 F.3d 477, 498 (5th Cir. 2008).

The "granting or denying of a motion for a physical examination rests in the sound discretion of the trial court." *Coca-Cola Bottling Co. of P. R. v. Negron Torres*, 255 F.2d 149, 153 (1st Cir. 1958); *accord Bucher v. Karuse*, 200 F.2d 576, 584 (7th Cir. 1953). "This court reviews evidentiary rulings for abuse of discretion and will reverse a district court's ruling only if it affects a substantial right of a party." *Caparotta v. Entergy Corp.*, 168 F.3d 754, 755–56 (5th Cir. 1999). The party asserting error bears the burden of proving substantial prejudice. *McDonald v. Steward*, 132 F.3d 225, 232 (5th Cir. 1998). Recently, we have underscored this rule, noting that, "[d]istrict courts enjoy wide latitude in determining the admissibility of expert testimony, and the discretion of the trial judge and his or her decision will not be disturbed on appeal unless manifestly erroneous." *Smith v. Goodyear Tire & Rubber Co.*, 495 F.3d 224, 227 (5th Cir. 2007) (citation omitted).

We review a district court's decision to submit a proposed interrogatory to the jury for abuse of discretion. *Moody v. FMC Corp.*, 995 F.2d 63, 66 (5th Cir. 1993).

DISCUSSION

I. Texas Tort Claims Act

Goodman argues that the district court erred in granting summary judgment in favor of Harris County and Hickman on her TTCA claims because, Goodman asserts, these arise out of the negligent and/or grossly negligent training and supervision of constables. Goodman seeks to hold Harris County and Hickman liable for claimed failures in their own right, not vicariously for Ashabranner's conduct.

The TTCA "creates a limited waiver of sovereign immunity." *Johnson v. Waters*, 317 F. Supp. 2d 726, 738 (E.D. Tex. 2004). Under the TTCA, "[a] governmental unit in the state is liable for: . . . personal injury and death so caused by a condition or use of tangible personal or real property if the governmental unit would, were it a private person, be liable to the claimant according to Texas law." TEX. CIV. PRAC. & REM. CODE § 101.021(2). Harris County is a governmental unit. *See id.* § 101.001(3). The TTCA does not, however, include individuals under its definition of a governmental unit. *Id.* Individuals may not be sued under the TTCA as the act "does not govern suits brought directly against an employee of the State." *Huntsberry v. Lynaugh*, 807 S.W.2d 16, 17 (Tex. App.—Tyler 1991, no writ).

Furthermore, the TTCA does not apply to claims arising out of an intentional tort. TEX. CIV. PRAC. & REM. CODE § 101.057(2); *Waters*, 317 F. Supp. 2d at 739. Also excluded from the TTCA are allegations against a governmental unit arising out of the same conduct that formed the basis of the intentional tort claims against its employee. *Tex. Dep't of Pub. Safety v. Petta*, 44 S.W.3d 575, 580 (Tex. 2001).

The TTCA is also not the appropriate vehicle for claims of negligent failure to train or supervise. *Id.* at 580–81. Such claims are not within the purview of the TTCA because "a plaintiff must allege an injury resulting from the 'condition or use of tangible personal or real property'" and "information is not tangible personal property, since it is an abstract concept that lacks corporeal, physical, or palpable qualitites [sic]." *Id.* at 580.

Thus, the district court's dismissal of claims under the TTCA was proper because: 1) suits against individual state employees are not cognizable under the TTCA, *Huntsberry*, 807 S.W.2d at 17, and 2) failure to train or supervise is not a proper cause of action under the TTCA, *Petta*, 44 S.W.3d at 580.

II. Section 1983 failure to supervise and train

A. Hickman

Goodman renews her failure to supervise and train claim asserting that the district court erred in dismissing this cause of action against Hickman under 42 U.S.C. § 1983. Goodman argues that Hickman was liable for failing to train Ashabranner because it was

this failure which resulted in the denial of Michael's constitutional rights.

Section 1983 provides a private cause of action against those who, under color of law, deprive a citizen of the United States of "any rights, privileges, or immunities secured by the Constitution and laws." 42 U.S.C. § 1983. Claims under § 1983 may be brought against persons in their individual or official capacity, or against a governmental entity. *See Board of County Comm'rs of Bryan County v. Brown*, 520 U.S. 397, 403 (1997). Personal-capacity suits seek to impose liability upon a government official as an individual while official capacity suits "generally represent only another way of pleading an action against an entity of which an officer is an agent." *Monell v. Dept. of Soc. Serv.'s of City of New York*, 436 U.S. 658, 690 n.55 (1978). Thus, "an official-capacity suit is, in all respects other than name, to be treated as a suit against the entity. It is *not* a suit against the official personally, for the real party in interest is the entity." *Kentucky v. Graham*, 473 U.S. 159, 166 (1985) (citation omitted).

In a personal-capacity suit, "it is enough to show that the official, acting under color of state law, caused the deprivation of a federal right." *Id.* In such a suit, the official may "assert personal immunity defenses" such as qualified immunity. *Id.* (citing *Harlow v. Fitzgerald*, 457 U.S. 800 (1982)). "The doctrine of qualified immunity shields government officials acting within their discretionary authority from liability when their conduct does not violate clearly established statutory or constitutional law of which a reasonable person would have known." *Wallace v. County of Comal*, 400 F.3d 284, 289 (5th Cir. 2005). The process of evaluating qualified immunity requires two steps:

"[t]he first step is to determine whether plaintiff alleged a violation of a clearly established constitutional right" and "[t]he second step requires determining whether . . . the official's conduct was *objectively* reasonable under clearly established law existing *at the time of the incident*." *Bazan ex rel. Bazan v. Hidalgo County*, 246 F.3d 481, 490 (5th Cir. 2001) (emphasis in original).

In a § 1983 claim for failure to supervise or train, the plaintiff must show that: "(1) the supervisor either failed to supervise or train the subordinate official; (2) a causal link exists between the failure to train or supervise and the violation of the plaintiff's rights; and (3) the failure to train or supervise amounts to deliberate indifference." *Smith v. Brenoettsy*, 158 F.3d 908, 911–12 (5th Cir. 1998). "For an official to act with deliberate indifference, the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference." *Id.* at 912 (internal quotation omitted). To establish deliberate indifference, "a plaintiff usually must demonstrate a pattern of violations and that the inadequacy of the training is obvious and obviously likely to result in a constitutional violation." *Cousin v. Small*, 325 F.3d 627, 637 (5th Cir. 2003) (internal quotation omitted). Where a plaintiff fails to establish deliberate indifference, the court need not address the other two prongs of supervisor liability. *Estate of Davis ex rel. McCully v. City of N. Richland Hills*, 406 F.3d 375, 382 (5th Cir. 2005). Furthermore, "for a supervisor to be liable for failure to train, the focus must be on the adequacy of the training program in relation to the tasks the particular officers must perform." *Robert v. City of Shreveport*, 397 F.3d 287, 293 (5th Cir. 2005)

(quotations and citation omitted). Moreover, "for liability to attach based on an 'inadequate training' claim, a plaintiff must allege with specificity how a particular training program is defective." *Id.*

Goodman does not specify whether her claims against Hickman arise in his official or personal capacity. Because official capacity suits are really suits against the governmental entity, Goodman's attempt to hold Hickman liable for failing to train and supervise Ashabranner, if in his official capacity, is subsumed within her identical claim against Harris County. Thus, her § 1983 claim against Hickman must be viewed as one asserted against him in his personal capacity if it is to survive independently.

As the district court determined, Goodman fails to set forth a § 1983 claim. Goodman has not shown that Hickman acted with deliberate indifference. Goodman admits that there was a policy on the use of deadly force and points to no pattern of violations or deficiencies in the training program. She merely states that some violations must have existed and these must have been due to a failure to train. This is not enough to carry her burden of showing deliberate indifference.

As Goodman's § 1983 claim fails because she has not shown deliberate indifference, we need not discuss the remaining prongs of supervisor liability. *Estate of Davis*, 406 F.3d at 382. For this same reason, an analysis of Hickman's defense of qualified immunity is unnecessary. Qualified immunity is only applicable as a protective shield once a plaintiff has made out a claim against an official acting in his individual capacity.

Thus, the district court did not err in granting summary judgment in favor of Hickman on Goodman's § 1983 claim.

B. Harris County

Next,Goodman raises her § 1983 claims against Harris County. She seeks to hold Harris County liable for failing to adequately train and supervise Ashabranner in the use of deadly force. She asserts that, while Harris County had a policy in place with respect to deadly force, it brought forth no evidence that specialized training had been required or undertaken either for constables or canines.

Largely the same analysis and conclusions follow as outlined above with respect to Goodman's § 1983 claim against Hickman. As the Supreme Court has long held, we "require[] a plaintiff seeking to impose liability on a municipality under § 1983 to identify a municipal 'policy' or 'custom' that caused the plaintiff's injury." *Brown*, 520 U.S. at 403. Furthermore, "municipal liability under §1983 attaches where—and only where—a deliberate choice to follow a course of action is made from among various alternatives by city policymakers." *City of Canton v. Harris*, 489 U.S. 378, 389 (1989) (internal quotation and alteration omitted). "Only where a failure to train reflects a 'deliberate' or 'conscious' choice by a municipality . . . can a city be liable for such a failure under § 1983." *Id.*

Goodman has failed to point to any policy or custom that lead to her son's death. She has also failed to set forth any intentional choice made by Harris County and shows no deliberate indifference on the part of Harris County to the need for policies and training.

Rather, Goodman admitted that Harris County had training policies and procedures but asserted that the county provided no evidence that these policies were actually followed. As previously noted, the burden is on Goodman to show deliberate indifference. She has provided no evidence with respect to training deficiencies. Goodman only speculates that the policies may not have been followed. This is insufficient for municipal liability.

Thus, the district court did not err in its grant of summary judgment in favor of Harris County.

IV. Sufficiency of the evidence

Ashabranner argues that the jury verdict should be overturned because, if Ashabranner's account of the night Michael died is to be believed, no constitutional violation occurred. As the sole surviving eye-witness to the incident, Ashabranner argues that Goodman can do no more than attack his credibility but can provide no contradictory evidence. He further asserts that an officer who later arrived on the scene corroborated his testimony that Michael had a shiny object in his pant's pocket and that this object may have looked like a weapon from Ashabranner's vantage point. Thus, he maintains that he was reasonable in his belief that Michael might pose a threat and the use of deadly force was necessary.

To establish a claim under § 1983 for excessive use of force, a plaintiff must first show that he was seized. *Flores v. City of Palacios*, 381 F.3d 391, 396 (5th Cir. 2004). Next, he must show: "(1) an injury that (2) resulted directly and only from the use of force that

was excessive to the need and that (3) the force used was objectively unreasonable." *Id.*

As the Supreme Court stated in *Graham v. Connor*, "[i]n addressing an excessive force claim brought under § 1983, analysis begins by identifying the specific constitutional right allegedly infringed by the challenged application of force." 490 U.S. 386, 394 (1989). *Connor* held that "*all* claims that law enforcement officers have used excessive force—deadly or not—in the course of an arrest, investigatory stop, or other 'seizure' of a free citizen should be analyzed under the Fourth Amendment and its 'reasonableness' standard." *Id.* at 395. Thus, "[d]etermining whether the force used to effect a particular seizure is 'reasonable' under the Fourth Amendment requires a careful balancing of the nature and quality of the intrusion on the individual's Fourth Amendment interests against the countervailing governmental interests at stake." *Id.* at 396. (internal quotation omitted). The determination of "reasonableness" under the Fourth Amendment is "not capable of precise definition or mechanical application . . . [but] requires careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." *Id.* (internal quotation omitted). The Court went on to explain that, "[a]s in other Fourth Amendment contexts, however, the 'reasonableness' inquiry in an excessive force case is an objective one: the question is whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them." *Id.* at 397.

An officer who faces suit based on an alleged § 1983 violation may raise the defense of qualified immunity. *Graham*, 473 U.S. at 166. "The 'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." *Connor*, 490 U.S. at 396.

Turning to the substance of the § 1983 excessive use of force claim before the jury, the parties do not dispute that Michael had been seized. Ashabranner also makes no claim that Michael's death was not an injury caused directly by his use of force. He only asserts that the use of force was reasonable under the circumstances. With respect to the defense of qualified immunity, Ashabranner also does not dispute that Goodman alleged a violation of a clearly established constitutional right—the use of excessive force in violation of the Fourth Amendment—arguing only that the use of force was reasonable and therefore did not violate the Constitution. Thus, with respect to both the § 1983 use of force claim and the qualified immunity defense, the issue at hand is whether Ashabranner's conduct was reasonable and whether the jury had evidence on which to base its verdict that it was not.

Despite Ashabranner's forceful contentions that the jury had no evidence upon which to disbelieve his account of the shooting, his testimony faced numerous challenges. Ashabranner claimed that Michael pushed him and the two struggled in the mud, also noting that pictures from that night showed that his uniform was wet and soiled. Yet, forensic evidence from the scene indicated that Ashabranner's uniform was not muddied and footprints in the area were equally consistent with a scene trafficked by the response

team that later arrived as with the altercation described by Ashabranner. Furthermore, Ashabranner's testimony that Michael pushed him and attempted to drown Nero was contradicted by medical evidence and witness testimony that Michael's right arm was "virtually useless" due to a gun-shot wound suffered only three months prior which had not yet healed. Michael also had severe lesions and bite-marks all over his body which were consistent both with protective wounds as with an attempt to drown Nero. While Ashabranner argued that he saw Michael reach for a shiny object in his right back pocket and a pair of pliers was later recovered from the scene, evidence that the mobility of Michael's right arm was limited contradicted this version of events. Further contradiction came in the form of the vantage point from which Ashabranner claimed to have observed the object. The jury heard testimony that it would have been impossible for Ashabranner to have seen anything from the claimed view-point. The jury also heard expert evidence that Ashabranner's approach to the incident was improper and correct tactics would have avoided the entire situation.

Because "[w]e accept all credibility choices that tend to support the jury's verdict" *United States v. Anderson*, 933 F.2d 1261, 1274 (5th Cir. 1991), it is clear that a reasonable jury could conclude that Ashabranner's use of force was not reasonable under the circumstances known to him at the time of the incident. Ashabranner repeatedly asserts that his testimony, "if believed," would preclude recovery for Goodman but there is no requirement that the jury ignore all evidence to the contrary and rely on Ashabranner's version of events alone. In fact, we have long held that "juries are free to choose among all

reasonable constructions of the evidence." *United States v. Charroux*, 3 F.3d 827, 831 (5th Cir. 1993) (internal quotation omitted). A reasonable jury could find that it was unreasonable for a constable to react with deadly force to a disabled suspect who was attempting to protect himself from the officer's canine. There was sufficient evidence to challenge Ashabranner's version of events and to find that Ashabranner was not entitled to qualified immunity as his conduct was unreasonable. *Bazan*, 246 F.3d at 490.

The threshold for reversing a jury verdict in a civil action requires a court to find that the jury's verdict has "*no* legally sufficient evidentiary basis." *Lane*, 241 F.3d at 445 (quotation omitted). The jury had ample evidence on which to base its verdict. Therefore, we decline to disturb the jury verdict.

V. Punitive damages award

Ashabranner argues that the jury's punitive damages award should be reversed. He lists this argument as one of the "issues presented for review" but fails to brief it. Because "claims . . . not briefed on appeal . . . [are] waived," Ashabranner has waived this claim. *Gates v. Tex. Dep't of Protective and Regulatory Servs.*, 537 F.3d 404, 438 (5th Cir. 2008).

VI. Expert testimony regarding Ashabranner's mental condition

Ashabranner seeks to overturn the jury verdict arguing that it was error to allow the psychological examination of his mental condition and that the district court abused its discretion by allowing Dr. Jay Tarnow ("Dr. Tarnow"), the psychiatrist who

performed the evaluation, to testify. He argues that Dr. Tarnow's testimony was highly prejudicial, inflammatory, and irrelevant. Ashabranner further maintains that this testimony went beyond the proper scope of expert opinion because Dr. Tarnow testified with respect to Ashabranner's veracity and credibility. Based on these assertions of error, Ashabranner seeks a new trial.

When a party's "mental or physical condition . . . is in controversy" the court may order that party "to submit to a physical or mental examination by a suitably licensed or certified examiner." FED. R.CIV. P.35. Such an order "may be made only on motion for good cause." *Id.*; *see also Schlagenhauf v. Holder*, 379 U.S. 104, 121–22 (1964). A party seeking to introduce expert testimony must show that: "(1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case." FED.R. EVID. 702; *see also Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 589–94 (1993). "When evaluating expert testimony, the overarching concern is whether or not it is relevant and reliable." *Smith v. Goodyear Tire & Rubber Co.*, 495 F.3d 224, 227 (5th Cir. 2007). With respect to the proper scope of expert testimony, "testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." FED. R. EVID. 704. Nevertheless, an expert may never render conclusions of law. *Snap-Drape, Inc. v. Comm'r*, 98 F.3d 194, 198 (5th Cir. 1996). Nor, may an expert go beyond the scope of his expertise in giving his opinion. *First United Fin. Corp. v. U.S. Fid. & Guar. Co.*, 96 F.3d 135, 136 (5th Cir. 1996) (noting that

expert testimony was properly rejected by the court because the "opinion of dishonesty goes beyond the scope of expertise.")

Ashabranner makes broad conclusory assertions that the district court should not have granted Goodman's motion for a psychiatric evaluation. As the district court pointed out, it allowed the evaluation to level the playing field because Ashabranner had indicated that he intended to prove what happened on the night of the shooting through the use of psychological evidence of Michael's mental state. This is not an abuse of discretion.

Ashabranner's assertions of error with respect to Dr. Tarnow's testimony are likewise weak and, accordingly, fail. Ashabranner does not challenge Dr. Tarnow's qualifications or methodologies, asserting only that Dr. Tarnow's testimony was not relevant and went beyond his professional opinion. A review of the record reveals that Dr. Tarnow's testimony was both relevant and within the proper scope of expertise. Dr. Tarnow limited his testimony to noting his professional observations of Ashabranner. Those observations included a diagnosis that Ashabranner showed cognitive weaknesses, some short-term memory problems, and attention span limitations. Dr. Tarnow nowhere concluded or testified that, as a result of the deficiencies he observed, Ashabranner fabricated any or all of his testimony. Because Ashabranner's case was premised almost exclusively on his own testimony, whether Ashabranner suffered from any limitations that may have affected his ability to accurately recall the night Michael died was highly relevant.

The most damaging testimony offered by Dr. Tarnow was that he observed inconsistencies in Ashabranner's account of the night he shot Michael and that Ashabranner exhibited anger-management problems and impulsive behavior. Based on Ashabranner's own statements, Dr. Tarnow described Ashabranner's anger at being defied by Michael who allegedly refused to stop when Ashabranner approached. Dr. Tarnow then gave his medical opinion that, based on his psychological analysis, Ashabranner overreacted to Michael, saw Michael as a "bad guy," and precipitated the confrontation through impulsive actions. Dr. Tarnow merely recounted what Ashabranner had described and gave his medical opinion on the psychological underpinnings of those descriptions. This testimony was relevant because it helped the jury understand Ashabranner's view of Michael that night and aided in the determination of whether Ashabranner's decision to shoot was objectively reasonable. Furthermore, Dr. Tarnow never opined that Ashabranner was lying but only presented the jury with the fact that he observed inconsistencies.

Even accepting Ashabranner's argument that some of Dr. Tarnow's testimony went beyond its proper scope, the error was harmless. *United States v. Achobe*, 560 F.3d 259, 268–69 (5th Cir. 2008) (noting that any error with respect to the admissibility of evidence was harmless given the amount of evidence produced). As previously outlined, the jury was presented with forensic, physical, and medical evidence that contradicted Ashabranner's account. Thus, it cannot be said that "[t]his is the unusual case where a new trial is needed because a full and fair presentation of the claims was impeded at trial, and substantial prejudice resulted." *Nichols v. American Nat. Ins. Co.*, 154 F.3d

875, 890 (5th Cir. 1998) (granting a new trial where erroneous evidentiary rulings so altered the course of trial as to deny a party a fair and impartial presentation of her case). Ashabrannar has failed to carry his burden of proving that he suffered substantial prejudice.

Thus, the district court's evidentiary rulings with respect to Dr. Tarnow were proper as the court did not abuse its discretion in allowing the testimony.

VII. Jury instruction sought by Ashabranner

Ashabranner seeks a new trial because the district court refused to submit his proposed interrogatory to the jury. The interrogatory he proposed, Ashabranner argues, set forth the second prong of qualified immunity—whether no reasonable officer could have believed that the use of deadly force against Michael was lawful. While admitting that the district court instructed the jury on qualified immunity, Ashabranner argues that, by failing to set forth a specific interrogatory on the second prong of qualified immunity, the district court committed an abuse of discretion.

"In determining whether a jury instruction is erroneous, this court determines whether the charge as a whole is a correct statement of the law and whether it clearly instructs the jury on the law applicable to the facts." *United States v. Ibarra-Zelaya*, 465 F.3d 596, 607 (5th Cir. 2006). We look to the following factors in determining whether the jury instructions were proper: "(i) whether, when read as a whole and in conjunction with the general charge the interrogatories adequately presented the contested

issues to the jury; (ii) whether the submission of the issues to the jury was 'fair'; and (iii) whether the 'ultimate questions of fact' were clearly submitted to the jury." *Barton's Disposal Serv. Inc. v. Tiger Corp.*, 886 F.2d 1430, 1435 (5th Cir. 1989) (citing *Dreiling v. Gen. Elec. Co.*, 511 F.2d 768, 774 (5th Cir. 1975)). Abuse of discretion is established if these factors are not met. *Id.* As previously noted, the defense of qualified immunity is a two-step inquiry: the allegation that a "clearly established constitutional right" was violated and the determination that "the official's conduct was *objectively* reasonable under clearly established law existing *at the time of the incident*." *Bazan*, 246 F.3d at 490.

The jury was asked: "Do you find by a preponderance of the evidence that Defendant Deputy Constable Terry Ashabranner's use of force was clearly excessive to the need and was objectively unreasonable." The jury answered "Yes." Ashabranner sought the following interrogatory: "Do you find, from a preponderance of the evidence that no reasonable officer possessing knowledge of clearly established law and the information known by Deputy Ashabranner on April 14, 2002, could have believed that his use of force against Michael Goodman on April 14, 2002 was lawful?"

A plain reading of the jury instruction belies Ashabranner's assertion of error. The instruction asks whether the use of force was objectively unreasonable, the very requirement set forth in step two of the qualified immunity analysis—the step Ashabranner now argues that the district court ignored. Furthermore, as Ashabranner admits, the district court instructed the jury on the defense of

qualified immunity. Thus, when taken as a whole, it cannot be said that the district court failed to properly set the ultimate issues of fact before the jury.

The district court therefore did not abuse its discretion.

CONCLUSION

The judgment of the district court is AFFIRMED.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 07-20816

[Filed June 9, 2009]

JEANETTE GOODMAN, Individually and as administratrix of the estate of Michael W Goodman Deceased

Plaintiff-Appellant-Cross-Appellee

v.

HARRIS COUNTY; ROBERT ECKELS, Harris County Judge; EL FRANCO LEE, Harris County Commissioner; STEVE RADACK, Harris County Commissioner; SYLVIA GARCIA, Harris County Commissioner; RON HICKMAN, Harris County Precinct 4 Constable

Defendants- Appellees

TERRY ASHABRANNER, Deputy Constable

Defendant-Appellee-Cross-Appellant

JUDGMENT

Appeal from the United States District Court
for the Southern District of Texas, Houston
D.C. Docket No. 4:03-CV-4198

Before WIENER, DENNIS, and CLEMENT,
Circuit Judges.

This Cause was Considered on the record on appeal and the briefs on file.

It is ordered and adjudged that the judgment of the District Court is affirmed.

IT IS FURTHER ORDERED that appellant-cross-appellee pay to defendant-appellees the costs on appeal to be taxed by the clerk of this court.

ISSUED AS MANDATE:

A True Copy Attest

Clerk, U.S. Court of Appeals, Fifth Circuit

By: _____
Deputy

New Orleans, Louisiana

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS HOUSTON DIVISION

Civil Action No. H-03-4198

[Entered October 2, 2007]

JEANETTE GOODMAN, INDIVIDUALLY AND AS ADMINISTRATRIX OF THE ESTATE OF MICHAEL W. GOODMAN, DECEASED, *Plaintiff,*	)
versus	)
DEPUTY CONSTABLE TERRY ASHABRANNER, *Defendant.*	)

FINAL JUDGMENT

On the 28th day of September, 2007, the above-styled and numbered case came on for trial. Both sides appeared and announced ready for trial, and the case was tried to a jury, one having been timely requested, from September 24 to September 28, 2007. At the conclusion of Plaintiff Jeanette Goodman's case in chief, Defendant Deputy Constable Terry Ashabranner moved for judgment as a matter of law as to Plaintiff's claims. Fed. R. Civ. P. 50(a). The Court denied Defendant's motion.

The case was submitted to the jury on September 28, 2007.

The jury questions and answers were as follows:

JURY QUESTION NO. 1

Do you find by a preponderance of the evidence that Defendant Deputy Constable Terry Ashabranner's use of force was clearly excessive to the need and was objectively unreasonable?

YES

Answer "Yes" or "No"

If you have answered "No", do not answer any more questions. Please sign and date the Certificate and return it to the Court.

However, if you have answered "Yes," please answer Question No. 2.

JURY QUESTION NO. 2

What sum of money, if any, do you find from a preponderance of the evidence should be awarded to Plaintiff as compensatory damages for Deputy Ashabranner's use of force against Michael Goodman?

Consider each element separately. Do not include damages for one element in another element. Answer in dollars and cents, if any.

Estate of Michael Goodman

Pain and Suffering and Mental Anguish:	**$250,000.00**
Funeral Expenses:	**$4,000.00**

Jeanette Goodman, Individually

Loss of Companionship and Mental Anguish in the Past:	**$500,000.00**
Loss of Companionship and Mental Anguish in the Future:	**$1,246,000.00**

Please proceed to Question No. 3.

JURY QUESTION NO. 3

Do you find from a preponderance of the evidence that Deputy Ashabranner acted with malice or willfulness or with callous and reckless indifference to the safety or rights of Michael Goodman in his use of force against Michael Goodman?

YES

Answer "Yes" or "No"

If you have answered "No", do not answer any more questions. Please sign and date the Certificate and return it to the Court.

However, if you have answered "Yes," please answer Question No. 4.

JURY QUESTION NO. 4

What sum of money, if any, do you find from a preponderance of the evidence should be awarded to Plaintiff as punitive damages for Deputy Ashabranner's use of force on the Deceased Michael Goodman?

Answer in dollars and cents, if any: **$3,000,000.00**

Based on the verdict of the jury, the Court **ENTERS** the following judgment:

Judgment is **GRANTED** in favor of Plaintiff Jeanette Goodman on her claim that Defendant Deputy Ashabranner violated her deceased son's, Michael Goodman's, constitutional right to be free from excessive force, in the amount of $2,000,000.00 for compensatory damages and $3,000,000.00 for punitive damages.

Post judgment interest shall accrue at a rate of 4.11% per annum from the date of judgment until paid.

THIS IS A FINAL JUDGMENT.

The Clerk shall enter this Order and provide a copy to all parties.

SIGNED this 1st day of October, 2007.

/s/Vanessa D. Gilmore
VANESSA D. GILMORE
UNITED STATES DISTRICT JUDGE

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 07-20816

[Filed August 7, 2009]

JEANETTE GOODMAN, Individually and as administratrix of the estate of Michael W Goodman Deceased

Plaintiff-Appellant-Cross-Appellee

v.

HARRIS COUNTY; ROBERT ECKELS, Harris County Judge; EL FRANCO LEE, Harris County Commissioner; STEVE RADACK, Harris County Commissioner; SYLVIA GARCIA, Harris County Commissioner; RON HICKMAN, Harris County Precinct 4 Constable

Defendants-Appellees

TERRY ASHABRANNER, Deputy Constable

Defendant-Appellee-Cross-Appellant

Appeal from the United States District Court
for the Southern District of Texas, Houston

ON PETITION FOR REHEARING EN BANC

(Opinion 06/09/09, 5 Cir., ___, ___, F.3d ____)

Before WIENER, DENNIS, and CLEMENT,
Circuit Judges.

PER CURIAM:

(X) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

( ) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service and not disqualified not having voted in favor (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ E B Clement
United States Circuit Judge

APPENDIX E

TITLE 42. THE PUBLIC HEALTH AND WELFARE
CHAPTER 21. CIVIL RIGHTS GENERALLY

42 U.S.C. § 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

APPENDIX F

FEDERAL RULES OF CIVIL PROCEDURE
TITLE V. DISCLOSURES AND DISCOVERY

Fed. R. Civ. P. 35. Physical and Mental Examinations

(a) Order for an Examination.

(1) *In General.* The court where the action is pending may order a party whose mental or physical condition--including blood group--is in controversy to submit to a physical or mental examination by a suitably licensed or certified examiner. The court has the same authority to order a party to produce for examination a person who is in its custody or under its legal control.
(2) *Motion and Notice; Contents of the Order.* The order:
(A) may be made only on motion for good cause and on notice to all parties and the person to be examined; and
(B) must specify the time, place, manner, conditions, and scope of the examination, as well as the person or persons who will perform it.

* * *

APPENDIX G

FEDERAL RULES OF EVIDENCE
ARTICLE IV. RELEVANCY AND ITS LIMITS

Fed. R. Evid. 404. Character Evidence Not Admissible To Prove Conduct; Exceptions; Other Crimes

(a) Character evidence generally. Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except:
(1) Character of accused. In a criminal case, evidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same, or if evidence of a trait of character of the alleged victim of the crime is offered by an accused and admitted under Rule 404(a)(2), evidence of the same trait of character of the accused offered by the prosecution;
(2) Character of alleged victim. In a criminal case, and subject to the limitations imposed by Rule 412, evidence of a pertinent trait of character of the alleged victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the alleged victim offered by the prosecution in a homicide case to rebut evidence that the alleged victim was the first aggressor;
(3) Character of witness. Evidence of the character of a witness, as provided in Rules 607, 608, and 609.

* * *

Supreme Court, U.S.
FILED
DEC 7 - 2009
OFFICE OF THE CLERK

No. 09-555

In The Supreme Court of the United States

TERRY ASHABRANNER,

Petitioner,

vs.

JEANETTE GOODMAN, Individually and as Administratrix of the Estate of Michael Goodman, Deceased,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF IN OPPOSTITION TO TERRY ASHABRANNER'S PETITION FOR WRIT OF CERTIORARI

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RESPONSE TO PETITIONER'S STATEMENT OF THE CASE

Respondent Jeannette Goodman (hereinafter "Goodman") disputes Petitioner Terry Ashabranner's (hereinafter "Ashabranner") Statement of the Case, which is replete with disputed facts and arguments presented at trial and soundly controverted. For a more accurate and succinct recounting of the case history, Goodman refers this Court to her Petition for Writ of Certiorari. No. 09-574.

RESPONSE TO PETITIONER'S REASONS FOR GRANTING THE PETITION

1. The Court of Appeals was correct in finding that the Trial Court did not abuse its discretion in admitting the testimony of Tarnow as Goodman had met the applicable criteria of Fed. R. Civ. P. 35(a)

Fed. R. Civ. P. 35(a) provides:

> When the mental or physical condition . . . of a party . . . is in controversy, the court in which the action is pending may order the party to submit to a physical examination by a physician, or mental examination by a physician or psychologist. . . . The order may be made only on motion for good cause shown. . . .

In *Schlagenhauf v. Holder*, this Court emphasized the limited circumstances under which a court may order mental or physical examinations:

> [S]weeping examinations of a party who has not affirmatively put into issue his own mental or physical condition are not to be automatically ordered merely because the person has been involved in an accident . . . and a general charge of negligence is lodged. Mental and physical examinations are only to be ordered upon a discriminating application by the district judge of the limitations prescribed by the Rule. To hold otherwise would mean that such examinations could be ordered routinely in automobile accident cases. The plain language of Rule 35 precludes such an untoward result.

379 U.S. 104, 121-22 (1964)

Under Rule 35, three requirements are necessary to enable a court to order a Rule 35 exam: (1) the party's physical or mental condition must be in controversy; (2) the expert must be either a physician or a psychologist; and (3) good cause must be shown. Each of these requirements was met by Goodman.

A. Ashabranner's mental condition was in controversy, particularly when he sought to justify his unreasonable actions by focusing on the mental state of the decedent

The trial court's decision to level the playing field, particularly when Ashabranner sought to make an issue of the decedent's mental condition, resulted in its decision to grant Goodman's Rule 35 motion. (R. 770) In essence, Ashabranner sought to justify his actions by providing the trial court with a psychiatric history and profile of the decedent, by and through, Dr. James L. Claghorn – a licensed psychiatrist, not psychologist. (R. 716-17)

As the trial court noted in its order:

"If the Defendants propose to try this case by establishing what likely happened based on psychiatric testimony then both sides should be able to avail themselves of that opportunity." (R. 770) Ashabranner immediately appealed the trial court's decision, which was ultimately dismissed by this court on jurisdictional grounds. *Goodman v. Harris County*, 443 F.3d 464 (5th Cir. 2006).

Inexplicably though, during the pendency of that appeal, the trial court granted Goodman's motion to exclude the testimony of Dr. Claghorn. (R. 1296)

However, the decedent's mental state remained a target at trial. For instance, a substantial amount of medical records relating to the decedent's mental

health history was admitted into evidence by the court. (R. 4349-50, 52-53, Def's Ex. 37)

Additionally, Ashabranner sought to elicit extensive testimony on the issue of the decedent's attention deficit hyperactivity disorder and other related psycho-social conditions (R. 4866-68, 4870). Clearly then, fair play and justice dictated that if the decedent's mental status be presented to the trial, no less than Ashabranner's should be provided the jury, as well.

Once Goodman met the strict requirements of Fed. R. Civ. P. 35(a), the court still had the discretion to deny Goodman's motion. However, the trial court clearly recognized the value of allowing Goodman to present testimony on the mental status of Ashabranner, particularly if the decedent's history would become a focal point of Ashabranner's case. The Court of Appeals clearly agreed with this rationale, holding that the trial court did not abuse its discretion in allowing this testimony.

B. Undisputed that Tarnow was a licensed psychiatrist

Fed. R. Civ. P. Rule 35 authorizes a mental examination only by a physician or a psychologist.

It is undisputed that Tarnow was a licensed professional, capable of conducting a full assessment of Ashabranner. (R. 4755-57) Indeed, the Court of Appeals found that Ashabranner did "not challenge

Dr. Tarnow's qualifications or methodologies." Appendix A, p. 18a.

C. Good cause was demonstrated by Goodman, clearly recognized by the trial court, and affirmed by the Fifth Circuit Court of Appeals

Good cause for an examination clearly existed and was ably demonstrated by Goodman, particularly when she presented the trial court with sufficient evidence, demonstrating Ashabranner's intent to make the decedent's mental state an issue.

i. Dr. Tarnow's testimony was probative, relevant to the inquiry and did not exceed the scope of his expert testimony

In his discussion, regarding the alleged prejudicial effect of Tarnow's testimony, Ashabranner invites this court to consider the holding in *Nichols v. American National Insurance Co.*, whereby the Eight Circuit Court of Appeals reversed the judgment on a jury verdict for the defendant and remanded the case for a new trial, in part because of the testimony of a psychiatrist called by the defense. 154 F.3d 875 (8th Cir. 1998).

One of the central issues on appeal in that case was whether the expert in question was permitted to testify beyond the proper scope of expert opinion to

testify about the plaintiff's veracity and credibility. *Id.* at 882.

The court fully considered the psychiatrist's testimony before finding that it did not comport with the fundamental guidelines for expert testimony. *Id.* at 882-884.

The court, citing Fed. Rules of Evidence 702 and *Daubert v. Merrell Dow Pharmaceuticals, Inc.*,[1] noted that: "Before admitting proffered expert testimony, the trial court must ensure that it is scientifically valid – that it is both reliable and relevant." *Id.* at 883.

Ultimately, the court found that the challenged testimony, impugning the plaintiff's psychiatric credibility and suggesting that recall bias, secondary gain, and malingering had influenced her story, was not a proper subject of expert testimony under Fed. R. Evid. 702 because the record did not demonstrate that these theories met the relevant and applicable *Daubert* criteria. *Id.* at 884.

In the instant matter, Dr. Tarnow's testimony met the *Daubert* criteria and was both relevant and reliable. Tarnow's initial testimony focused exclusively on the diagnostic measures employed by his associate, Dr. Sophie Havasay, in her examination of Ashabranner. (R. 4758-59, 4761-63) His subsequent testimony focused on his own examination of

---

[1] 509 U.S. 579 (1993).

Ashabranner, before he provided the jury with an overview of his findings. (R. 4774-77)

In stark contrast with *Nichols*, Tarnow did not attempt to characterize Ashabranner. He simply presented the results of numerous objective tests, as well as his individual examination and observations of Ashabranner. Undeniably, Tarnow's "descriptions" related to his perceptions of Ashabranner's behavior during his examinations, rather than an attack on Ashabranner's credibility. Indeed, the Court of Appeals found that the greatest damage done to Ashabranner by Tarnow was the "observed inconsistencies in Ashabranner's account of the night he shot Michael and that Ashabranner exhibited anger-management problems and impulsive behavior." Appendix A, p. 19a.

The Court ultimately concluded that "Tarnow merely recounted what Ashabranner had described and gave his medical opinion on the psychological underpinnings of those descriptions." *Id.* And unlike the testimony presented in Nichols, Tarnow did not opine "that Ashabranner was lying . . . he only presented the jury with the fact that he observed inconsistencies." *Id.*

As such, Tarnow's testimony satisfied the requirements of Daubert and was both reliable and relevant and the Court of Appeals was correct in finding that the trial court did not abuse its discretion in admitting Tarnow's testimony.

2. The Court of Appeals was correct in finding that, even if Tarnow's testimony exceeded its proper scope, any error was "harmless"

Ashabranner argues that the admission of Tarnow's testimony was prejudicial and harmful. As in his argument before the Court of Appeals, Ashabranner provides little evidence to support this argument. Indeed, he appears to argue that, but for Tarnow's testimony, the jury would have likely found for Ashabranner. That position is untenable in light of the overwhelming "forensic, physical, and medical evidence" contradicting Ashabranner's account. Appendix A, p. 19a.

With the exception of Ashabranner's self-serving testimony, there was no evidence presented by Ashabranner to support his account of the events of April 14, 2002. Indeed, his own testimony was replete with inconsistencies often contradicted by the physical evidence. For instance, Ashabranner claimed that:

- His investigatory stop/detention of the decedent was on the shoulder of a dark, heavily wooded four lane highway, with little ambient light. (R. 4531-32)
- While standing perpendicular to the decedent's left, Ashabranner viewed a shiny, object in decedent's right rear pocket or waistband, an area pocket conceivably obscured by a large duffle bag. (R. 4447-48, 4459, 4536)

- While standing to the LEFT of the decedent, attempting to reach for the shiny object he spied in decedent's RIGHT rear pocket, the decedent assaulted him. (R. 4535, 4538)
- The decedent fled into or onto a wooded easement. (R. 4417, 4544-46)
- The decedent, after being repeatedly bitten, attempted to drown Nero, a canine. (R. 4546-49)
- He wrestled with decedent, in an attempt to free his canine, and handcuff him. (R. 4549-51)
- Decedent assaulted Ashabranner a second time and then attempted to reach, with his right hand, for his right rear pocket. (R. 4552)

First and foremost, Ashabranner's position, during his first encounter when he attempted to frisk or pat down the decedent, would have made it impossible for him to see a shiny, metallic object in the decedent's right rear pocket. He would literally have to be able to see around a corner. Second, the lighting conditions on the night in question would have made it a near impossibility for Ashabranner to observe a small, shiny object tucked into the decedent's right rear pocket. According to Ashabranner, though having two flashlights on his person, he did not use either one. (R. 4551) Additionally, the position of Ashabranner's vehicle – facing towards the easement and several yards away from the decedent's initial position by the side of the road – did not allow for

much, if any light. (R. 4384) Moreover there were no overhead or streetlights on the street in question. (R. 4405, 4531-32) Finally, according to Ashabranner, the decedent was carrying a large, duffel bag over his right shoulder, draping down low on the decedent's person, covering his right rear pocket. (R. 4402-03)

After shooting the decedent, despite the potential threat he posed, Ashabranner did not attempt to secure the decedent or ensure that he did not still have access to a weapon. Instead, he walked away – to focus on checking his dog and calling EMS. (R. 4553) He left the decedent "laying on his back" conceivably, still in position to grab a weapon and harm him. (R. 4553, 4640-41)

Additionally, there was very little objective evidence to support Ashabranner's account. For instance, Ashabranner testified that he engaged in a violent altercation with the decedent in a wet and muddy area of the easement. However, the evidence he offered – photographs of the condition of his clothes following the shooting – did not support his contentions. (R. 4451, 4453-54)

Ashabranner wrongfully asserts that the key evidence supporting the Court of Appeals decision was accounts regarding the decedent's use of his dominant right arm.

For the record, Goodman presented at trial x-rays – demonstrating the injury to decedent's

dominant right arm from being shot. (Pltfs. Ex. 17)[2] Notably, Ashabranner did not attack those records, but focused on the testimony of two individuals who could best qualify whether or not the decedent had any use of his dominant right arm.

Ashabranner argues that testimony by the Respondent and the decedent's friend, Dustin Kelly, that the decedent did not have a lot of use for his right arm was "speculative at best." However, that statement flies in the face of the evidence provided by Goodman regarding the nature of the incident when the decedent was shot, as well as the extremely limited use of his dominant right arm up to and including the time he was shot by Ashabranner. (R. 4830-32) The decedent's friend and co-worker, Dustin Kelly, testified that he observed the decedent on numerous occasions and had firsthand knowledge that the decedent had "little use out of" his dominant right arm. (R. 4730) He testified that while he allowed the decedent to work with him, "to just to put something in his pocket" . . . he "just – he wasn't much good. You know, he could sweep the floors. He was a gofer. You know, go get me this. Go get me that. That's all he was good to me for." (R. 4730) Kelly testified that a number of times following the shooting, the decedent would have his arm in a

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[2] There was also testimony from the medical examiner, who admitted that x-rays of the decedent's body revealed that the fracture in the decedent's right humerus had not yet fully healed. (R. 5141-42)

sling "because it hurt." (R. 4731) Most important, however, was that Kelly was the last person to see the decedent the night before he was killed and was well aware of the decedent's limitations up to and including the night of his death. (R. 4733, 4742-43, 4747, 4754) Finally, based on what Kelly knew of the decedent – and the use (or lack of use) of his right arm – it would have been impossible for him to "push another person" or "wrestle[d] with" a rabid sixty-five pound dog. (R. 4731-32)

Tarnow's testimony may have been considered by the jury in its decision to find for Goodman. However, just as likely, Tarnow's testimony may have been disregarded or minimized by the jury in light of the overwhelming physical evidence demonstrating that Ashabranner did use deadly force in violation of the decedent's Fourth Amendment rights.

Accordingly, the Court of Appeals correctly found that Ashabranner had not suffered substantial prejudice.

CONCLUSION

For all the foregoing reasons, Terry Ashabranner's Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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